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No. 93-1992

In The

Supreme Court of the United States

October Term, 1994

JOHN MARTIN-MUSUMECI, etc.,

Petitioner,

vs.

LAW OFFICES OF HERBERT HAFIF
PENSION AND PROFIT SHARING PLAN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF JURISDICTION

Respondent believes this court lacks jurisdiction and that the case is not, as the Petitioner suggests, as "so far departed from the accepted and usual course of judicial proceedings . . . as to call for and exercise of this court's power and supervision." It is simply a correct, unpublished decision by the Ninth Circuit Court of Appeals, a decision which clearly is within their discretion if not mandated by Rule 36-2, which limits the Ninth Circuit Court of Appeals ability to seek the publication of an opinion. In addition, the area of law requested for review is not "unsettled", but rather well defined.

STATUTES INVOLVED

California *Commercial Code* Section 9505(2):

> "(2) In any other case involving consumer goods or any other collateral a secured party in possession may, after default, propose to retain the collateral in satisfaction of the obligation. Written notice of such proposal shall be sent to the debtor if he has not signed after default a statement renouncing or modifying his rights under this subdivision. In the case of consumer goods no other notice need be given. In other cases notice shall be sent to any other secured party from whom the secured party has received (before sending his notice to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. If the secured party receives objection in writing from a person entitled to receive notification within 21 days after the notice was sent,

> the secured party must dispose of the collateral under Section 9504. In the absence of such written objection the secured party may retain the collateral in satisfaction of the debtor's obligation."

STATEMENT OF THE CASE

The undisputed facts reveal that in July of 1984, John Martin (Petitioner), through a series of misrepresentations as to value, induced Respondent to lend him $350,000, upon which loan he has never paid a penny in interest or principal and which Respondent to this day has been unable to sell.

This fraudulently obtained loan was secured by a pledge of "two points" of a beneficial interest in something called Micro/Vest. In essence, it constituted a beneficial interest in a trust.

Micro/Vest was a corporation without directors, shareholders or assets, other than a single note, which on its face provided the holder of the note the right to convert the outstanding balance of the note into 20% of the shares of Computerland stock.

Pursuant to the terms of the note, Petitioner was to make interest only payments every six months. He never made one payment. On March 13, 1985, the Law Offices of Herbert Hafif Pension & Profit Sharing Plan (hereinafter "the Plan") sent Petitioner written notice of default. Still, no payment was ever made. On August 13, 1985, the Plan gave Petitioner written notice of retention and foreclosure. The written notice stated:

> "As has been communicated to you several times, this is not a security we can sell. This is especially true in light of the lawsuits against Micro/Vest. We cannot subject the pension plan participants to exposure to multi-million dollar lawsuits over the sale of the security.
>
> Furthermore, since your efforts to sell the security have been unavailing, efforts which we appreciate have been made more difficult by the lawsuits, and since we owe the utmost fiduciary duty to our plan's participants, the plan has foreclosed on the security.
>
> We deem the foreclosure final with title to the security vested in the pension plan."

No written objection was ever made by the Petitioner to the Plan's retention of the security under California *Commercial Code* Section 9505(2). (Findings, p. 8.)

Approximately three years later in 1988, the Petitioner filed for bankruptcy. In 1990, *five years* after the Plan had foreclosed on the two points, the Petitioner filed suit against Respondent for violation of California *Commercial Code* Section 9504(3).

The Petitioner has alleged that the Respondent did not have the right to strictly foreclose on the two points under California *Commercial Code* Section 9505(2). Petitioner argues that the Plan was required to sell the two points under California *Commercial Code* Section 9504(3) and distribute any excess proceeds to Petitioner.

The Respondent still retains the security, and although the law is abundantly clear that no monetary damages are available to Petitioner when the security has

not been disposed of, it is clear from the testimony provided during trial that the two points were not remotely worth the principal and interest owed by Petitioner.

By Petitioner's own expert testimony, he has "not investigated the market thoroughly" but has placed a value of $700,000 on each point because that "is what people are willing to pay or willing to sell them for . . . " (Transcript, p. 111.)[1] In fact, in 1985, the year of the foreclosure, there were only five transactions that occurred, "three to the Myers group, one to the Griswolds, and the final was to the pension plan." (Findings, p. 112.) Three of these transactions were made by Petitioner himself. Petitioner's expert witness based his entire valuation on these five transactions. However, under cross-examination, when asked if he received the 1985 financial statement for Computerland from Petitioner's attorneys, he stated, "I asked for them and did not receive them." (Transcript, p. 120.)

When asked if he understood that Computerland's 1985 after-tax earnings had dropped to $2,000,000, the witness responded that he "understood that the after-tax

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[1] This paid testimony comes despite the fact that under the terms of the note itself, that the Petitioner himself drafted, the Petitioner was given ninety (90) days to find a buyer for the collateral. No buyer was ever found by the Petitioner. As has been the story for eight (8) years now, nobody is "willing to pay" for this security despite what their expert testified to. In fact at the District Court appeal hearing the Respondent again offered the security back to the Petitioner for the principal and interest owed. As should come as no surprise the Petitioner rejected the offer.

had declined significantly" but stood by his paid evaluation. (Transcript, p. 121.)

It was clear that the Micro/Vest points had no market, representing nothing more than a claimed interest in a lawsuit that had yet to be won, a result that has not yet ever yielded any cash some eight (8) years after the loan had been made.

The only peculiar area of the Bankruptcy Court's findings was its dictum that supported this evaluation, which, of course, would ignore any standard valuation approaches, whether they be net worth analysis, book value analysis, market value analysis, price earnings analysis, cash flow analysis or comparative market analysis. It is inconceivable how this *infinitesimal fractional* interest (4/10ths of 1%) in a company with after-tax earnings of only $2,000,000 could possibly be worth $1,400,000 as the Bankruptcy Court noted in dictum. Petitioner "tags" his entire brief with result-oriented arguments, but should look at the Bankruptcy Court's dictum as pure result-oriented arguments, but should look at the Bankruptcy Court's dictum as pure result-oriented from the classic "give and take" now settled conclusion, something Petitioner has ignored.

Nonetheless, as the Bankruptcy Court found, Respondent was in possession of the security and had given proper notice under Section 9505(2) of retention of the security as satisfaction of the debt and such that any argument by Petitioner that he felt it was "too late" to object was "not credible." (Findings, p. 8.).

ARGUMENT

1. An Unpublished Opinion is Not the Type of Action by the Appellate Court that is "So Far Departed From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of this Court's Power of Supervision".

Petitioner's entire argument for this court to grant its Writ of Certiorari is based on Supreme Court Rule 10, which grants the court jurisdiction to hear matters where the United States Court of Appeals has rendered a decision that has "So far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision." Rule 10(1)(a):

An unpublished decision that is well reasoned, as the case at hand, is not the type of departure that Rule 10 contemplates.

Ninth Circuit Rule 36-2 in pertinent part states:

> "A written, reasoned disposition shall be designated as an opinion *only* if it: (g) is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the court and the separate expression. *FRAP* 36-2. (Emphasis Added.)

Although Judge Noonan of the Ninth Circuit dissented to the majority's opinion, he did so in only one sentence and did not request publication of the disposition of the court. If Judge Noonan really felt that this was a decision that was "So far departed from the accepted and usual course of judicial proceedings . . . as to call for

the exercise of this court's power of supervision, he certainly would have implemented Rule 36-2(g) and sought publication. However, Judge Noonan intentionally did not seek such a request as he knew this was a well settled area of law which does not have the judicial and social importance that Petitioner cries.

2. The Ninth Circuit's Opinion Does Not Establish, Alter, Modify, Criticize or Clarify Existing Law.

Although there were many issues that the lower court cited in favor of Respondent, the issue that Petitioner seeks is that of "possession" under California *Commercial Code* Section 9505(2). Petitioner suggests the Ninth Circuit somehow modified existing law to allow a general intangible to be possessed under California *Commercial Code* Section 9505(2), something Petitioner suggests *cannot* be possessed under California *Commercial Code* Section 9505(2).

However, the lower courts in this action and other legal authorities, have already ruled that such an intangible may be possessed for purposes of Section 9505(2).

In the law of secured transactions under the *Uniform Commercial Code*, 2d Ed, Section 4.10(3), pages 159-160, Clark states:

> "For another case that implies that retention and satisfaction of the debt is permissible even when the collateral is intangible, such as accounts receivable, see *In Re Emergency Beacon Corp.*, The clear implication from the case is that strict foreclosure would be available as an option for the accounts assignee." *Id.*, at 160 (*In Re Emergency*

Beacon Corp., 441 U.C.C. Rep. 1544 (jdn.y.1985) 481 BR 341. See *Grossman v. Lippson*, 81 Cal.App. 544, 146, Cal.Rptr. 741 (1978), where the court made it clear that a general intangible is capable of being possessed under the California *Commercial Code* wherein Grossman was allowed to repossess and take possession of all "intangible assets of the business", including the "good will." *Id.* at 744-45.

3. An Unpublished Decision is not Grounds for Writ of Certiorari.

In *Taylor v. McKeithen*, 407 U.S. 191, 92 S.Ct. 1980, 32 L.Ed.2d 648 (1972), a case cited by Petitioner, then Justice Renquist stated:

> "I think decisions as to whether opinions should accompany judgments of the court of appeals, and the desirable length and content of those opinions are matters best left to the Judges of the Courts of Appeals." *Id.* at 196. (Renquist dissenting). Justice Renquist went on to state:
>
> "No existing statute or rule of procedure prohibits the Fifth Circuit from issuing a short opinion and order, as it has done here, or from deciding cases without any opinion at all. *Cf. Rule 21, Court of Appeals for the Fifth Circuit.* The Courts of Appeal and particularly the Fifth Circuit, which has experienced the heaviest caseload of all the circuits, need the maximum possible latitude to deal with the 'flood tide' of appeals that the 'ever growing explosive increase' of federal judicial business has produced." *Id.* at 195-96, (See also *Isbell Enterprises, Inc. v. Citizens Casualty Co.*, 431 F.2d 409: *NLRB v. Amalgamated Clothing Workers*, 430 F.2d 966.)

4. A General Intangible is Clearly Capable of Being Possessed Under the California Commercial Code.

There is no question that a security interest can be created in a general intangible. Section 9102 defining the policy and scope of Division 9 states:

"This division applies (a) to any transaction (regardless of its form) which is intended to create a security interest in . . . general intangibles . . . " Section 9102.

The only formal requirement is the consensual intent by the parties to create a security interest. Once this intent is manifested, the next step in the blueprint is for the secured party to attach and then perfect his security interest so others cannot lay claim to the same interest or, in essence, to give the secured party priority.

Section 9203 entitled "Attachment and enforceability of security interest;" lays out three elements or prerequisites for attachment,

"(a) The collateral is in the possession of the secured party pursuant to agreement, or the debtor has signed a security agreement which contains a description of the collateral;

(b) Value has been given,

(c) The debtor has rights in the collateral . . .

Attachment occurs as soon as all of the events specified . . . have taken place." Section 9203.

It's important to note that the Code recognizes that possession does not have to be actual or literal, but rather can be pursuant to an agreement as illustrated in subdivision (1)(a).

However, once the security interest has been attached, the next step for the secured party is to perfect his interest in the security for two reasons. One, to give notice to third parties of his interest in the security, and two, to gain priority over any claims, by alleged bona fide purchasers as is illustrated by Section 9301 identifying persons who take priority over unperfected security interests.

When this is taken in context with the purpose of Division 9, which "is to cover (1) the creation of a security interest with priorities and (2) the giving of notice of a security interest to third parties," it is easy to see why the word "possession" was used by the drafters. *Article 9, Introductory Comment, West Annot., p. 282.* The rationale of the section is to protect third parties, not, as here, the Petitioner/Debtor who already has notice and by virtue of having drafted the document would be estopped to assert a defect in notice in any event.

Possession conveyed actual or constructive notice to *third* parties that someone besides the Debtor had a claim or possible claim to that interest. This puts the third party on notice that if he was thinking about taking a security interest in the property, he may be doing so with the risk that the Debtor has already pledged the property. With this notice, the third party could not become a bona fide purchaser or take priority over the original creditor.

However, the code also recognized that certain interests, general intangibles, could not ordinarily actually physically be touched, or were not ordinarily represented by a written notice (i.e., different from possession) and place a third party on effective notice that someone else

laid claim to that interest. Therefore, to remedy this situation the code required the secured party to file a financing statement with the Secretary of State, thereby placing all third parties on notice of the secured parties' interest in the collateral and establishing and/or guaranteeing his priority.

This is illustrated under the purposes of Section 9203 which states:

> "Perfection of a security interest (see Section 9303) will in many cases depend on the additional step of filing a financing statement (See Section 9302) or possession of the collateral (Section 9304(1) and 9304)." It only depends on the type of collateral held.

The Petitioner's argument misinterprets the purposes of Section 9305 by suggesting that a general intangible cannot be possessed. Nowhere in the purposes of Section 9305 do they indicate a general intangible cannot be possessed.

The purposes of Section 9305 only reiterate what certain types of collateral Section 9305 allow possession to perfect a security interest. It does not say a general intangible cannot be possessed. The purposes of Section 9305 state:

> "A security interest in accounts and general intangibles property not ordinarily represented by any writing whose delivery operates to transfer the claim may under this Article be perfected only by filing . . . " *Section 9305, Purposes.*

Section 9305 addresses the issue of "when possession by [a] secured party perfects [a] security interest without

filing". It does not indicate or suggest a general intangible cannot be possessed.

On the contrary, the Code expressly recognizes that a general intangible can be possessed, but because it is not "ordinarily represented by any writing whose delivery operates to transfer the claim," it may only be *perfected* by filing.

This is supported by *In Re S.O.A.W. Enterprises, Inc.*, 32 Banks 278, 37 U.C.C. Rep. Serv. (1983), which clearly found a general intangible possessable, but only capable of being perfected through filing.

The *Uniform Commercial Code Law Journal*, Vol. 23, No. 2, Page 189, citing the opinion of *S.O.A.W. supra*, stated:

> "Castle Rock had *possession* of the participation agreements in dispute. When the court concluded that Castle Rock's interest was a *general intangible*, its fate was sealed since perfection of a general intangible can only be accomplished through the filing of a financing statement. See *U.C.C.* Section 9305, Comment 1, showing how this conclusion is reached. Had the collateral been found to be other than a general intangible, or account, Castle Rock might still have prevailed if it could have established its possession as perfection." (*Id.* at 189, Footnote 18.) (Emphasis added.)

In addition, the purposes of Section 9305 refer the reader back to Section 9302(1) which addresses the issue of when filing is required to perfect a security interest.

Section 9302 specifically excludes an assignment of a beneficial interest in a trust from the filing requirements, clearly indicating that at least this type of intangible

collateral is capable of being possessed or its functional equivalent for the purposes of perfecting a security interest.

Section 9302(1)(c) specifically states:

> "(1) A financing statement must be filed to perfect all security interests *except* the following:
>
> (c) A security interest created by an assignment of a beneficial interest in a trust . . . " Section 9302(1)(c).

This section clearly indicates that a security interest in an assignment of a beneficial interest in a trust, a general intangible, is capable of being perfected without filing. In essence, indicating a general intangible is capable of being possessed.

The irony is this is the exact type of collateral, a beneficial interest in a trust, that Respondent foreclosed on under Section 9505(2).

Section 9505(2) deals with the "compulsory disposition" and "acceptance of the collateral as discharge of the obligation." In essence, it speaks to an interest that has already been attached and perfected and has now entered into default.

In dealing with these very issues in *Grossman v. Lippson*, 81 Cal.App. 554, 146 Cal.Rptr. 741 (1978), the court made it clear that a general intangible is capable of being possessed under the California *Commercial Code*.

Grossman owned and operated the Mediterranean carwash which was subsequently subleased to the defendant and debtor Lippson. After Lippson's default on the equipment lease and promissory note, Grossman "took

possession of the carwash business, equipment and premises" and subsequently filed suit against Lippson for the unpaid balance of the note. The court specifically stated:

> "The transfer took the form of a sublease of the underlying real property: the lease purchase of carwash equipment, and a sale of the goodwill, tradename and other *intangible* assets of the business." *Id.* at 744. (Emphasis added.)

The court continued to state:

> "Yet what was sold was a package – one that included goodwill, tradename, *intangibles*, improvements, fixtures, premises, and carwash equipment, all the elements needed to conduct the business. On default, the seller *repossessed* the entire package – premises, equipment, and business . . . " *Id.* at 745. (Emphasis added.)

The court continues to make the issue of possession of a general intangible expressly clear by stating:

> "When the business fell on hard times, land, equipment, and the on-going business were all simultaneously repossessed by the seller-creditor." *Id.* at 745

Here, the general intangibles are the components of the "on-going business," in essence the goodwill, tradename and other intangibles of the business. In interpreting the California *Commercial Code*, the court stated:

> "Accordingly, when the creditor *repossessed* all three components of the enterprise's (premises, equipment and on-going business) the debtor became entitled to receive credit against the unpaid balance of the promissory note for the value of each of the three components

> *repossessed*, which together constituted the security for the debt." *Id.* at 747.

Here the court is making it abundantly clear that a general intangible under the California *Commercial Code* can be possessed as was illustrated by *Grossman* repossessing the general intangibles of the on-going business of the Mediterranean carwash. In *The Law of Secured Transactions Under the Uniform Commercial Code*, 2nd Ed., Section 4.10[3], pp. 159-160, *Clark* states:

> "For another case that implies that retention and satisfaction of the debt is permissible even when the collateral is intangible, such as accounts receivable, see *In Re Emergency Beacon Corp.* The clear implication from the case is that strict foreclosure would be available as an option for the accounts assignee." *Id.* at 160.

In Re Emergency Beacon Corp., 441 U.C.C. Rep. 1544 (JD N.Y. 1985), 48 BR 341, the debtor, Emergency Beacon, received a loan from Montco that was secured in part by Beacon's accounts receivable, a general intangible.

To satisfy the debt, *Beacon* turned over to Montco the accounts receivable.[2] The court then specifically states that *"Montco acquired possession"* of the accounts receivable. *Id.* at 346. A general intangible.

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[2] Here, *Beacon* gave possession of the accounts receivable to Montco without a 9505(2) notice of retention. The court held that a turnover of accounts receivable to the secured creditor did not constitute an implied satisfaction of the entire debt owed to Montco because no notice was given as required under 9505(2).

In Re Emergency Beacon Corp. makes it clear by its express language that a general intangible can be "acquired" and therefore, "taken possession" of under Section 9505(2).

This is further supported by the express purpose of Section 9505(2) as stated in the *Code Comment*.

> "Purposes: (1) Experience has shown that the parties are frequently better off without a resale of the collateral: hence this section sanctions an alternative arrangement. In lieu of resale or other disposition, the secured party may propose under subsection 2 that he keep the collateral as his own, thus discharging the obligation and abandoning any claim for a deficiency." *Code Comment* Section 9505(2).

The code recognizes that some types of collateral are unique in nature and not the type frequently sold on a common market. Therefore, to avoid the uncertainties and hassles of fulfilling the obligations of what is and is not a commercially reasonable manner in a collateral that is unique and does not have a ready and common market, the code sanctions an alternative arrangement; in essence, proposing to retain the collateral as satisfaction of the debt.

The code purpose gives no hint or suggestion that a general intangible cannot be possessed. To somehow suggest that a general intangible should be excluded from Section 9505(2) would be contrary to the code purpose, in essence, allowing an alternative arrangement to Section 9504.

As the trial court so eloquently stated:

> "Section 9505(2) does not limit its applicability to certain types of collateral. Indeed, the reach of the Commercial Code otherwise extends to both the creation and enforcement of a security interest in general intangibles. It would violate basic principles of statutory construction to read this form of collateral out of Section 9505(2)." (Findings, pp. 6-7.)

Even the District Court has stated that Petitioner's argument must fail because:

> "Section 9505(2) does not limit its application to certain kinds of collateral. There is nothing in either Sections 9505(2) or 9504, or the comments to those sections, which specifically limits the application of Section 9505(2) as debtor suggests." (Opinion, P.5)[3]

The Ninth Circuit agreed citing *Kruse, Kruse & Mikolsko v. Beedy*, 353 N.E. 2nd 514, 539 (Ind.App. 1976) as applicable when *Kruse* found that:

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[3] The District Court further held that the debtor's argument must fail because the "bankruptcy judge found that while Appellee may not have been in actual possession of the collateral, it had sufficient dominion and control over it to constitute 'possession' for purposes of § 9505(2)." This holding was based on a finding that the trustee to the trust acknowledge Appellee's control over the two percent (2%) interest in a letter to Appellee dated July 16, 1984, in which the trustee recognized that Debtor had "transferred an interest" in the trust and agreed to "act in accordance with writings from your office regarding disposition of said two percent undivided beneficial interest." (Opinion, pp. 5-6)

> "Possession of collateral by a bailee who has received notification of the interest of a secured party is considered to be possession by the secured party." *Id.* at 539.

The Ninth Circuit found this case analogous because the Trustee of Micro/Vest, acting as bailee for Respondent, had acknowledge possession by a letter to all interested parties. (Pet. Brief 26a)

Therefore, all three lower courts have sided with Respondent and the applicable case law and have found that a general intangible is capable of being possessed for purposes of Section 9505(2).

5. The Respondent Has Properly Foreclosed Under Section 9505(2) Because the Petitioner Has Failed to Object in Writing within 21 Days of Notice.

Section 9505(2) follows the agreement's terms and allows the secured party after default to *propose* to retain the collateral in satisfaction of the debt. If the debtor disagrees with this proposal and wants the collateral disposed of under Section 9504, then he must state his objections *in writing* within 21 days of the notice of proposal sent by the secured party. Section 9505(2).

"When an objection is received by the secured party he must then proceed to dispose of the collateral in accordance with Section 9504 . . . " otherwise he may retain the collateral in satisfaction of the debt. *Code Comment, Purposes 9505(2).*

The *code* specifically states that, "In the absence of such written objection the secured party may retain the

collateral in satisfaction of the debtor's obligation." Section 9505(2).

The record is clear. There was never a written objection sent by Petitioner, let alone within the 21 days required by the code. In fact, not even a hint of objection to the retention was even received by Respondent until approximately five years later when Petitioner filed suit. (Transcript and Findings, p. 8).

As rightfully stated by the trial court:

> "Had he [Petitioner] sent a written objection within the 21 day period prescribed by the statute, he might now be in a position to assert his rights under Section 9504. Having failed to object, he lost that right, and the foreclosure became valid." (Findings, p. 8). Both the District Court and Ninth Circuit joined in this reasoning.

The code makes it clear that if the debtor does not object in writing within the 21 days, he has waived any right that would require the secured party to proceed under Section 9504. The same is necessarily true that the debtor has waived his right to object that the secured party was not in possession of the collateral. As indicated in *8 U.C.L.A. Law R. 953*, "By not objecting to the secured party's proposal to retain the collateral, the debtor relinquishes any claim to the surplus proceeds." *Id.* at 953.

It is obvious the 21 day period was established to allow the secured party to rely on the Debtor's lack of objection, so the secured party could then proceed with the collateral as he sees fit. To allow the Debtor to object after the 21 day period would have a secured party in a

state of flux and uncertainty as to the collateral and at the mercy of the Debtor. This is supported by *8 U.C.L.A. Law R.* (*supra*), which states, "If the proposal is accepted by the debtor and others with an interest, the secured party is free to deal with the security as he wishes. . . . " *Id.* at 953.

By the Debtor's (Petitioner's) lack of written objection within the 21 days prescribed by Section 9505(2), Respondent has properly foreclosed. Debtor cannot sit back, wait to see what happens to the property, and then make an objection five years later, claiming a ridiculous value that *never* existed. Especially when Debtor was offered and re-offered the stock for simply what was owed. No answer for years! Now he has an objection.

6. The Respondent Gave Proper Notice of a Proposal to Retain the Collateral in Satisfaction of the Debt.

On March 13, 1985, Respondent sent notice to Petitioner that he was delinquent on payment per the terms of the note.

The note, *drafted by the Petitioner himself, specifically allowed* Respondent to retain the collateral in satisfaction of the debt if a buyer for the security could not be located by either Respondent or Petitioner within 90 days of the March 3, 1985 notice.

The note specifically states that after notice of delinquency is sent:

> "The holder shall have 90 days from the date of such demand within which to locate a buyer or

> buyers and complete said sale. I (Petitioner) agree to assist the holder in locating a buyer and in closing such transaction . . . In the event the holder is unable to arrange one or more transactions yielding enough to cover such claim, I shall have the right, during 90 days from the date of the notice of delinquency, to arrange for such transaction myself. *In the event transactions of sufficient size are not arranged by the holder or by me, then on the 91st day after the date of the notice, full title to said security shall transfer to the holder and shall be deemed full satisfaction of the entire obligation: I shall not be liable for any real or alleged deficiency."*

Therefore, by the specific terms of the note which the Petitioner himself drafted, he eliminated the danger of a deficiency and agreed that he was placed on notice that if a sale could not be arranged, either by Respondent or Petitioner, that Petitioner would then strictly foreclose under Section 9505(2).

In addition, it was made perfectly clear to Petitioner that Respondent would not sell the collateral but rather, elect to retain the collateral in satisfaction of the debt when it stated in its March 13, 1985 letter that, *"We certainly do not wish to exercise our right of conversion. We just want to get paid back and alleviate the bank's fiduciary concerns."*

Furthermore, the same proposal was sent to Petitioner, *five months later,* on August 13, 1985, when Respondent stated:

> "As has been communicated to you several times, this is not a security we can sell. This is especially true in light of the lawsuits against

> Micro/Vest. We cannot subject the pension plan participants to exposure to multi-million dollar lawsuits over the sale of the security.
>
> Furthermore, since your efforts to sell the security have been unavailing, efforts which we appreciate have been made more difficult by the lawsuits, and since we owe the utmost fiduciary duty to our plan participants, the plan has foreclosed on the security."

By the express language of the August 13, 1985 letter, the Petitioner was clearly on notice that the Plan would not and could not sell the security.

The same concern Respondent had been communicating to Petitioner about the difficulties of selling such a security including the potential liabilities that existed were conveyed in the *Uniform Commercial Code Law Journal*, Vol. 6, No. 1404, page 339, when it stated:

> "Section 9505(2) is often employed, for example, in cases of disposition of unregistered securities whose public sale under Section 9504(3) would be fraught with difficulty." *Id.* at 339.

Although Respondent believes this language is more than clear that Respondent would be retaining the collateral as satisfaction of the debt, it, at the very least, would put a reasonable person on notice that Respondent was proposing to retain the collateral in satisfaction of the debt.

The trial court agreed by stating:

> "Even if the August 13, 1985 letter was not in the nature of a proposal, I find that the March 13, 1985 letter can be fairly read as being one. Consistent with their agreement, Martin was

> given 90 days to find a buyer on the two points. During that time, he must surely have been aware of the fact that the plan was doing nothing to sell the note, and probably intended to keep it." (Findings, pp. 8-9.)

In fact, the trial court, after listening to the testimony of Petitioner, stated:

> "While the letter does state that the foreclosure is final 'with title vested in the pension plan,' the fact remains that, thereafter, Martin did nothing to protect the loss of the 2%. *His half-hearted assertion that he felt it was too late is not credible,* particularly in light of defendant's August 25th letter which left the door open for Martin to repurchase the 2% for the principal and interest owing." (Findings, p. 8.)

Petitioner's credibility as determined by the trial court is a question of fact that should be viewed under the clearly erroneous standard. *In the Matter of Pizza of Hawaii, Inc.*, 761 F.2d 1374, 1377 (9th Cir. 1985). Even the District Court stated:

> "The bankruptcy court's finding on the notice issue presents questions of fact which are reviewed under the clearly erroneous standard. Here, the March 13th letter clearly gave notice that Debtor was in default. Additionally, as the bankruptcy court found, the letter indicated that Respondent did not wish to exercise its right to conversion. The court found that this letter was sufficient notice. The fact that Debtor did nothing to address this issue, despite repeated requests, further supports the bankruptcy court's findings."

The Ninth Circuit agreed by pointing to the March 13, 1985 letter and stating:

> "This letter specifically indicates that the plan is giving 'notice pursuant to the terms and conditions of the note'. Pursuant to the agreement, debtor was given 90 days to find a buyer for the two percent. The Bankruptcy Court found that debtor 'neither found a buyer, nor paid off the note, nor protested the impending foreclosure called for in the agreement.' " (Pet. Brief 26a)

Respondent even gave Petitioner 60 more days to find a buyer or buy back the two points for just the principal and interest owed. The Ninth Circuit found that the:

> "Bankruptcy judge's determination that notice was given was not clearly erroneous."

In fact, the Ninth Circuit held that:

> "Even if we review de novo reasonableness of notice as a matter of law, as debtor urges, we find the three letters sent to debtor over a six month period constituted notice that the Plan was proposing strict foreclosure." (Pet. Brief 26a)

It is clear that the trial court, District Court and Ninth Circuit Court have determined that the March 13, 1985 letter did represent a proposal. The fact that Petitioner argues that the March 13, 1985 letter was not in the nature of a proposal, but rather a final statement:

> "Is not credible, particularly in light of defendant's August 25th letter which left the door open for Martin to repurchase the 2% for the

principal and interest owing." (Findings, pp. 8-9.)

Petitioner was given numerous opportunities to repurchase the collateral for the principal and interest owing, however, Petitioner never responded to such offers, let alone object that a foreclosure was improper.

Therefore, it is clear that under the terms of the note which Petitioner himself drafted, the March 13, 1985, August 13, 1985, and the August 25, 1985 letter, that Petitioner was well aware that the Plan intended on retaining the collateral in complete satisfaction of the debt. Petitioner's argument that he felt it was too late to object to Respondent's retention is simply "not credible."

CONCLUSION

For the reasons set forth above, the Respondent herein submits that a Writ of Certiorari should not be granted in this case.

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